

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

MARC GLASSMAN, INC. D/B/A MARC'S DEEP DISCOUNT

Employer

and

Case No. 8-RC-16508

**UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 880, AFL-CIO, CLC**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (the Act), a hearing was held before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.¹ I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time employees employed by the Employer at its 4499 Mayfield Road, South Euclid, Ohio facility, including all pharmacy technicians, cart retrievers, food stock persons, general merchandise stock employees, produce clerks, closeout stockers, warehouse workers, cashiers, cash office employees, and customer

¹ I find that the hearing officer's rulings at the hearing are free from prejudicial error and are affirmed. The hearing officer's ruling regarding the Petitioner's subpoena duces issues are also affirmed as adequate testimonial evidence was submitted during the hearing rendering the requested documents cumulative. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposed of the Act to assert jurisdiction in this matter; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning representation of these employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The parties have filed post-hearing briefs which I have carefully considered.

service employees, but excluding the store manager, the assistant store managers, the operations manager, the pharmacists, lead cashier supervisor and confidential employees and all professional employees, guards and supervisors as defined in the Act.

Approximately 90 employees are in the unit found to be appropriate.

Introduction

The parties are in agreement that the petitioned-for single store unit is appropriate in this case but disagree regarding the composition of such a unit. There are two issues in this matter. The first is whether the Employer's store warehouse manager is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the unit. The second issue is whether the Employer's pharmacy technicians share a sufficient community of interest with the general merchandise employees to be appropriately included in the unit. The Petitioner contends that both classifications set forth above, the store warehouse manager and the pharmacy technicians, are appropriately included in the unit. The Employer disagrees with that contention.

For the reasons described more fully below, I find that the store warehouse manager is not a supervisor within the meaning of Section 2(11) of the Act. In addition, I find that the pharmacy technicians are appropriately included in an overall unit of the Employer's employees at this store.

Facts

The Employer, which does business as Marc's Deep Discount, is engaged in the retail sale of groceries and general merchandise at several locations in the Cleveland, Ohio area. Its Mayfield/Green retail store located in South Euclid, Ohio is the only located involved. This store was opened approximately seven to eight years ago. The store is comprised of two formerly separate buildings. One was formerly a bank and now

houses the pharmacy and the other, a former grocery store, houses most of the general merchandise. At the time of the opening of the store, a wall was removed to join the buildings into one area in which customers have access to both the pharmacy and general merchandise.² There are two entrances to the store, one in the general merchandise area and a second in the pharmacy area. There is a small room off the pharmacy area which has been designated as the pharmacy break room and a large employee break room at the rear of the store, which contains the time clock and all employee schedules. The Employer also maintains a warehouse at its Mayfield/Green location.

The store and the pharmacy have the same hours Monday through Friday and are open from 8:00 a.m. to 9:00 p.m. On Saturdays, the store and pharmacy open at 8:00 a.m., the pharmacy closes at 6:00 p.m. and the store closes at 9:00 p.m. On Sundays, the store opens at 8:00 a.m., the pharmacy opens at 9:00 a.m., and both close at 6:00 p.m. The warehouse begins its deliveries at 6:00 a.m. or 7:00 a.m. in the morning and the deliveries continue until approximately 2:00 p.m.

The Warehouse Supervisor

In maintaining its stock, the Employer received daily shipments of goods from its suppliers based on the purchases made by the purchasing department. The store warehouse manager is responsible for the receipt of merchandise in the warehouse, the verification of bills of lading, the verification of quantities of product delivered, organizing the products in the warehouse, as well as ensuring that specific product is delivered to the appropriate departments.³ After the warehouse manager communicates

² The record evidence indicates that general merchandise is sold in the pharmacy area.

³ The individual holding the position of store warehouse manager, Jason Strong, is also responsible for maintaining OSHA guidelines and regulations vis-à-vis heavy equipment operated by store employees and fire code regulations.

to the appropriate department managers, such as grocery, health and beauty, and automotive, that specific product has been delivered to the warehouse, the product is pulled from the warehouse on pallets that contain products identified for a specific department. The store stockers are responsible for shelving the product. The store warehouse manager also performs a training function for new warehouse employees and assistant managers.⁴ District stockroom managers visit the warehouse on a weekly or biweekly basis to inspect the warehouse and to make any necessary recommendations to the Vice President of Operations. In doing this inspection, the district stockroom managers complete a so-called stockroom visitation report that is forwarded to the Vice President of Operations and which details priorities for the warehouse manager. The store warehouse manager spends approximately 70 percent of his working time performing standard warehouse employee functions.

For the reasons that follow, I find that the Employer has failed to carry its burden of proving that the store warehouse manager, Jason Strong, is a statutory supervisor under the Act, and I therefore include him in the unit.

Section 2(3) of the Act excludes from the definition of “employee” any individual employed as a supervisor. Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁴ The record testimony reflects that Strong has been selected to train new employees on warehouse policies and procedure.

To meet this definition, an individual need only possess the authority to perform any one of the indicia listed, provided that the authority is exercised using independent judgment on behalf of management and not in a routine manner. **Clark Machine Corp.**, 308 NLRB 555 (1992); **Browne of Houston, Inc.**, 280 NLRB 1222, 1223 (1986). Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. See, e.g. **Energy Systems & Service**, 328 NLRB No. 125 (1999). The burden of proving supervisory status rests on the party asserting the status. **NLRB v. Kentucky River Community Care, Inc.**, 121 S.Ct. 1861, 1866-67 (2001); **Bennett Industries, Inc.**, 313 NLRB 1363 (1994).

The Board has noted that the legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not perceived as part of management, from those supervisors truly vested with genuine management prerogatives. **George C. Foss Co.**, 270 NLRB 232, 234 (1984). The Board has further explained that “[i]n enacting Section 2(11) Congress emphasized its intention that only truly supervisory personnel...should be considered supervisors and not ‘straw bosses, lead men, set-up men, and other minor supervisory employees.’” **Chicago Metallic Corp.**, 273 NLRB 1677, 1688-89 (1985) *enfd* in relevant part 794 F.2d 527 (9th Cir. 1986).

The Board has noted its duty not to construe the statutory language of Section 2(11) too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. **Hydro Conduit Corp.**, 254 NLRB 433, 437 (1981); **St. Francis Medical Center-West**, 323 NLRB 1046 (1997).

In analyzing the supervisory status of the store warehouse manager I have carefully considered the warehouse manager's authority with respect to his assignment of work, responsible direction of other employees and his effective recommendations to hire, discharge and reward employees. There was no evidence in the record to demonstrate that the store manager has suspended, laid-off, recalled, promoted, discharged or adjusted grievances of other employees nor that he has engaged in the recommendation of such action.

In support of its position the Employer relies principally on three incidents to establish that Strong is a statutory supervisor. First, the Employer contends that Strong recommended the rehire of a former employee, Frank DiLella. Michael Tomko, the Employer's Vice President of Store Operations, testified that Strong recommended DiLella for rehire despite the fact that DiLella had been discharged with a recommendation to not rehire him. The evidence reflects that while Strong recommended the rehire of DiLella, the store manager and Tomko reviewed DiLella's personnel file to determine his ability to perform and concluded that DiLella should be rehired. Tomko testified that employees regularly recommend individuals for employment and such recommendations are considered in the determination to hire. There is no evidence that DiLella was hired on Strong's recommendation alone, as Tomko testified that he was aware of DiLella's character. Nor was there any evidence to show that Strong's recommendation that DiLella be rehired was any different from other instances where employees have recommended that individuals be hired. Furthermore, there was no evidence presented to show that Strong is involved in the hiring process of new employees.

Tomko further testified that Strong recommended that warehouse employee, Dan Koston, receive a merit raise. Tomko again testified that Strong made a recommendation and such recommendations are fully considered and investigated by the store manager, district managers and, occasionally, Tomko. There was no evidence that Strong possesses the authority to reward employees without the review and determination of a higher authority. Tomko specifically testified that the authority to reward employees is vested in the store manager.

The third example submitted by the Employer was an incident in which Strong reported that an employee, Dwight Jones, was stealing from the Employer. It should be noted that the employee handbook provides that all employees have a duty to report to management officials incidents of theft or suspicion of theft by other employees.⁵ Further, Tomko's testimony provides that while the Employer considered Strong's suspicion, Tomko investigated possible theft by Jones and determined that there was in fact a basis for such suspicion. Subsequently, after review of Jones' work record, a decision was made to discharge Jones for absenteeism, rather than suspicion of theft.

In each of the incidents, the record evidence demonstrates that the Employer, through store management and/or Tomko, reviewed each incident and conducted an independent investigation before taking action with respect to each of those employees.

In **Kentucky River**, *supra*, the Supreme Court ruled that the Board may not exclude from the independent judgment required in Section 2(11) the professional or technical judgment used in directing less-skilled employees to deliver services. The Court recognized, however, that it is within the Board's province to determine what scope or degree of discretion meets the statutory requirement of "independent judgment."

The Court stated, “[m]any nominally supervisory functions may be performed without the exercis[e of] such a degree of...judgment or discretion...as would warrant a finding of supervisory status under the Act.” **Id.**, citing **Weyerhaeuser Timber Co., 85 NLRB 1170, 1173 (1949)**. The Court also agreed with the Board that if the Employer limits the degree of independent judgment by, for example, detailed orders, an individual acting under such orders may be found not to be a statutory supervisor. **Kentucky River at 167, citing Chevron Shipping Co., 317 NLRB 379, 381 (1995)**.

I have considered the facts of this case in light of the Supreme Court’s decision in **Kentucky River**, and have concluded that there is insufficient evidence of independent judgment in the assignment of work by Strong to warrant a supervisory finding.

In reaching this conclusion, I further note that the Board has consistently found that making job assignments based upon employees skills and abilities and production needs does not involve the use of independent judgment. In finding that press supervisors’ authority to control the work assignments of their crew did not involve the use of independent judgment in **North Shore Weeklies, Inc., 317 NLRB 1128, 1130 (1995)** the Board noted that the press supervisors made work assignments based upon selecting the employee best capable of performing a certain task or based on the need to separate two talkative employees. The Board found that such decisions “indicate no more than the press supervisors need only exercise routine judgment based upon experience or ordinary craft skills.” The Board also found significant the fact that work assignments did not result in any difference in employee pay. **Id.**

In **MJ Metal Products, Inc., 325 NLRB 240 (1997)** the Board similarly found that the assignments of employees to various machines and tasks based solely on the

⁵ Tomko testified that the Employer maintains a help telephone line for employees to report such concerns.

training and skill level of the employee along with production needs did not involve the use of independent judgment. In that case, the individuals whose supervisory status was at issue assessed the scheduled production at the start of the shift and assigned employees to machines or tasks at the start of the shift and after lunch break. In **S.D.I. Operating Partners, L.P.**, 321 NLRB 1111 (1996) the Board also noted the fact that a leadman “directs employees to perform various necessary tasks according to the skills they have previously demonstrated” involves “no real managerial discretion that would require the use of independent judgment.” In **Vanport Sand and Gravel, Inc.**, 267 NLRB 150 (1983), the Board held that job assignments based on an employee’s skills and the production needs of the plant did not involve the use of independent judgment.

Similarly, in **Milliard Refrigerated Services, Inc.**, 326 NLRB 1437 (1998) the Board held that the fact that leaders assign crew employees to various tasks and may rotate the employees between different jobs and different crews does not by itself establish the responsibility to direct employees. The Board reasoned that these employees “are experienced employees who know which of their fellow employees have the greater skill and experience. Their use of this information when assigning service work does not establish that they exercise independent judgment.” **Id.** at 1438.

In the instant case, the warehouse manager’s role in assigning and directing work is insufficient to establish supervisory status. Strong, as part of his job responsibilities, is required to communicate with department managers to inform them that particular products have been received in the warehouse. Strong also informs the warehouse employees that product has been received. There was no evidence elicited that Strong assigns warehouse employees particular tasks, nor was there any evidence that Strong

directs the department managers when he informs them that particular product has been received in the warehouse. Additionally, no evidence was submitted to demonstrate that Strong's communication responsibility requires any independent judgment.

I find, therefore, that the record fails to establish that the authority the store warehouse manager exercises with respect to assignment and direction of work involves the use of independent judgment.

There was no evidence that Strong has conducted any evaluations or appraisals of employees, nor was there any evidence to reflect that Strong has hired or fired any employees. Accordingly, I find that the store warehouse manager lacks any of the primary indicia of supervisory authority.

In the absence of any primary indicia of supervisory authority, secondary indicia alone cannot establish statutory supervisory status. **General Security Services Corp., 326 NLRB 312 (1998); St. Francis Medical Center–West, 323 NLRB 1046, 1047 (1997).** Therefore, having found that the warehouse manager possesses no primary indicia of supervisory status, I need not consider the evidence presented that he possesses any secondary indicia of supervisory status.

Pharmacy Technicians

The Employer maintains that its pharmacy department is a separate entity from the general merchandise store. In this connection, the Employer submits that the pharmacy technicians do not share a sufficient community of interest with the other store employees to be included in an appropriate unit. The Petitioner contends that the pharmacy technicians share a community of interest with the general merchandise employees and should therefore be included in the petitioned-for overall unit. After

review of all of the relevant factors, I find that the pharmacy technicians share a community of interest with the other employees at the facility and are appropriately included in the unit.

There are approximately 10 pharmacy technicians, a pharmacy manager and an assistant pharmacy manager. The record evidence shows that during the day shift, there are three pharmacy technicians on duty with a single pharmacist. In the evenings, there are two pharmacy technicians on duty with a single pharmacist. There is no required certification for hire as a pharmacy technician.⁶ The general responsibilities of the pharmacy technicians are to serve the customers; answer the telephone; read prescriptions; perform computer checks to locate the generic or name brand equivalents of the prescribed drugs, count pills, and ring out customers on the cash register. In addition, the pharmacy technicians are responsible for maintaining the two pharmacy cash registers.⁷ The record evidence also shows that the pharmacy technicians pull some drugs from the shelves; confirm that the drugs are labeled properly and elicit some information from customers regarding identification information and potential drug allergies. The pharmacy technicians report directly to the pharmacy manager. The Employer also retains a district pharmacy manager who reports to the Vice President for Pharmacy Operations.

It is well-settled Board law that a wall-to-wall unit in the retail industry is an appropriate unit. **A. Russo & Sons, Inc.**, 329 NLRB 402, 403 (1999); **Stern's Paramus**, 150 NLRB 799 (1963). The Board has historically held that the unit sought by the

⁶ The record evidence reflects that two of the ten pharmacy technicians retain pharmacy technician certifications, while the remaining eight do not have such certifications.

⁷ Such maintenance includes, retrieving and returning the cash drawer to the cash office and running the register throughout the day to check out customers.

petitioner is always a relevant consideration and that the unit sought must only be an appropriate unit. **Overnite Transportation Co., 322 NLRB 723 (1996).** Thus, in the instant case, applying traditional community of interest factors, the Employer must establish that the petitioned-for unit is inappropriate. These factors include the degree of functional integration between employees; common supervision; employee skills and job functions; interchangeability of employees; contact among employees; fringe benefits; and similarities in wages, hours, benefits and other terms and conditions of employment. **Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).**

Although the Employer submits that the pharmacy operation is completely separate from the general merchandise store, the record evidence shows that pharmacy technicians ring up grocery items with pharmacy items.⁸ In addition, the pharmacy technicians sort general merchandise that customers decide to not purchase and place those items in a bin that is picked up in the pharmacy area by a store employee at the end of the shift. The pharmacy technicians are responsible for preparing the cash registers by visiting the cash office just as all the cashiers do.

While the Employer maintains that the pharmacy employees use the small break room near the pharmacy, the testimony of pharmacy technician Anna Bradley reveals that the pharmacy technicians rarely use the small room, rather they take breaks in the large employee break room, where the time clock is located.⁹ The record evidence shows that pharmacy employees clock in using the same time clock as other employees and a copy of the pharmacy work schedule is posted in the main break room for employee

⁸ The record testimony shows that the five item limit is disregarded at times.

⁹ The large break room also contains a coat rack, lockers, refrigerator, microwave and coffee pot for the use of all employees. A pay telephone for employee use is located just outside the large break room.

convenience.¹⁰ All employees collect their paychecks at the customer service booth on the same paydays.¹¹

The evidence shows that the Employer has transferred employees from the general merchandise area to the pharmacy for temporary assignments as well as long term transfers.¹² Further, the pharmacy employees are subject to the same policies as set forth in the employee handbook and receive the same fringes and benefits as the employees in the general merchandise area of the store.

The Employer did present testimony showing that due to the nature of the products, pharmacy products are separately warehoused and inventoried and that the pharmacy utilizes a separate profit and loss basis.¹³ Further the Employer submits that the pharmacy employees have dress code regulations that do not apply to the employees in the general portion of the store.¹⁴ The record reflects that while pharmacy technicians report directly to the pharmacy manager, both the store manager and the operations manager have supervisory authority over the pharmacy technicians.¹⁵ The store operating officer reviews store policies, passes out employee handbooks and answers the employment related questions of the pharmacy employees.

¹⁰ There is another copy of the pharmacy technician work schedule posted in the pharmacy area.

¹¹ Bradley also testified that she received the same Thanksgiving bonus as other employees.

¹² The relevant testimony from Felicia Keith, a general merchandise employee, was asked to cover shifts in the pharmacy approximately eight times in the last 24 months. Keith testified that she worked in the pharmacy operating registers, answering the pharmacy telephone, checking out prescriptions to customers and counting pills.

¹³ It should be noted that no evidence was submitted to show how this affects employees.

¹⁴ The record evidence shows that all employees have dress code requirements and that stock employees, grocery employees and cashiers all wear different colored smocks. The only additional restriction on pharmacy employees is that they are restricted from wearing dungarees.

¹⁵ Anna Bradley testified that during a dispute with a pharmacy customer, the store manager was contacted to resolve the issue. Also, Felicia Keith testified that Dee Bolt, operations manager, assigned Keith to work in the pharmacy rather than her regular general merchandise shelf stocking duties on the occasions where she was temporarily transferred to cover shifts in the pharmacy.

The Employer contends that with the implementation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the separation between the pharmacy technicians and the general merchandise employees will be more distinct.¹⁶ Joseph Raso, the Employer's Vice President of Pharmacy Operations, testified that the Employer's policies and procedures, which will be consistent with the HIPAA, have yet to be completed or published to the store employees.¹⁷ I find that since new procedures consistent with HIPAA have yet to be implemented, they do not negate the community of interest that presently exists among the store employees. Accordingly, applying the traditional factors, I find that the pharmacy technicians share a community of interest with the general merchandise employees and are appropriately included in the petitioned-for overall unit.

CONCLUSION

For all the foregoing reasons, I find that the store warehouse manager is not a supervisor according to the definition set forth in Section 2(11) of the Act, and that the pharmacy technicians share a sufficient community of interest with the general merchandise employees. I therefore include both the store warehouse manager and the pharmacy technicians in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible

¹⁶ This Act ensures the confidentiality of health related records.

to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 880, AFL-CIO, CLC.**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-**

¹⁷ Bradley testified that she was unaware of any future policy changes and the implementation of any new procedures in the pharmacy area have not yet occurred.

Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994).** The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by March 24, 2003.

Dated at Cleveland, Ohio this 10th day of March, 2003.

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

460-7550-8700